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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 UNITED STATES OF AMERICA,  
10 Plaintiff,  
11 v.  
12 CRISPIN GARCIA-ESPANA,  
13 Defendant.

NOS. CR-04-223-RHW  
CR-04-253-RHW

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
WITHDRAW GUILTY PLEA**

14 Before the Court is Defendant's Motion to Withdraw Plea of Guilty (CR-  
15 04-223-RHW [Ct. Rec. 68]). A hearing was held on the motion on February 5,  
16 2007. Defendant was present and represented by Kim Deater. The Government  
17 was represented by Pamela Byerly.

18 Defendant plead guilty on January 6, 2005, and on April 21, 2005, was  
19 sentenced to a 30 month term of incarceration; a three year term of supervised  
20 release; and a \$100 special penalty assessment. Additionally, Defendant was  
21 sentenced to a 12-month consecutive sentence as a result of his guilty plea on  
22 alleged supervised release violations. Defendant appealed his sentence. On  
23 September 16, 2006, the Ninth Circuit remanded the case for resentencing in light  
24 of the *Shepard v. United States*, 544 U.S. 13 (2005), and specifically instructed, as  
25 follows:

26 In complying with the remand in this case, the district court  
27 may enter such orders, including without limitation, vacating the  
28 judgment, as the district court in its discretion deems appropriate.

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1 (Ct. Rec. 49).

2 Defendant now moves to withdraw his guilty plea, asserting that his plea  
 3 was not knowing and voluntary, due to ineffective assistance of counsel. The  
 4 Government opposes Defendant's Motion to Withdraw Guilty Plea.

5 **DISCUSSION**

6 The Court finds that it has jurisdiction to hear Defendant's motion based on  
 7 the Ninth Circuit's instruction that this Court may enter any order in its discretion  
 8 it deems appropriate.

9 Pursuant to Fed. R. Crim. P. 11(e), a defendant may not withdraw a guilty  
 10 plea except as a result of a direct appeal or a collateral attack. Allegations that a  
 11 plea was entered into involuntarily because of ineffective assistance of counsel is  
 12 sufficient grounds upon which to collaterally attack the validity of a plea  
 13 agreement. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (applying *Strickland v.*  
 14 *Washington* analysis to ineffective-assistance claims arising out of the plea  
 15 process).

16 Whether a guilty plea is valid turns on "whether the plea represents a  
 17 voluntary and intelligent choice among the alternative courses of actions open to  
 18 the defendant." *Id.* (citation omitted). Where "a defendant is represented by  
 19 counsel during the plea process and enters his plea upon advice of counsel, the  
 20 voluntariness of the plea depends on whether counsel's advice was within the  
 21 range of competence demanded of attorneys in criminal cases. *Id.* (citation  
 22 omitted). Under *Hill*, in order to successfully challenge his guilty plea, the  
 23 defendant must show that his counsel's representation fell below an objective  
 24 standard of reasonableness, and he would not have pleaded guilty and would have  
 25 insisted on going to trial.<sup>1</sup> *Id.* at 59.

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27       <sup>1</sup>In its response, the Government contends that the *Strickland* standard only  
 28 applies to § 2255 motions. The Court disagrees. In *United States v. Davis*, the

1       Here, the Court finds that Defendant's guilty plea was not knowing and  
2 voluntary. Through the course of his criminal proceedings, Defendant was  
3 represented by Ted Mahr. The Court finds that Mr. Mahr's representation fell  
4 below an objective standard of reasonableness when Mr. Mahr failed to research or  
5 discuss the fact that Defendant that he had a possible defense to the § 1326 charge.  
6 Defendant submitted a declaration that stated that his counsel never discussed with  
7 him any other legal option he may have had other than to enter a guilty plea.  
8 Additionally, the Court finds that Mr. Mahr's representation at the sentencing  
9 hearing fell below an objective standard of reasonableness. It is undisputed that he  
10 failed to submit a sentencing memorandum. He also failed to object to the United  
11 States Probation Officer's recommendation that Defendant receive a 16-point  
12 enhancement for his vehicular homicide conviction. Ultimately, the Court  
13 concluded that a 16-point enhancement should not be applied, and instead, applied  
14 an 8-point enhancement.<sup>2</sup>

15       The Court's finding that Defendant's counsel's representation fell below an  
16 objective standard of reasonableness is bolstered by the fact that Mr. Mahr  
17 misrepresented the circumstances surrounding the sentencing to the Ninth Circuit  
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19       Ninth Circuit held that prior to sentencing, the *Strickland* standard of prejudice  
20 does not apply, but stated that this standard would apply where a defendant is  
21 seeking to withdraw his guilty plea after sentencing. 428 F.3d 802, 806 (9<sup>th</sup> Cir.  
22 2005).

23       <sup>2</sup>Upon further research, the Court believes that this 8-point enhancement was  
24 in error. In *Fernandez-Ruiz v. Gonzales*, the Ninth Circuit held that in order for an  
25 offense to meet the federal definition of a crime of violence found in 18 U.S.C. §  
26 16, the offense must involve the intentional use of force against the person or  
27 property of another. 466 F.3d 1121, 1129 (9<sup>th</sup> Cir. 2006). Crimes that involve the  
28 reckless or grossly negligent use of force do not meet this definition.

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1 Court of Appeals. In his Response to Appellant's Pro Se Motion, Mr. Mahr stated  
2 the following:

3 the plea bargain contemplated a level 16 adjusted basis for Mr. Garcia,  
4 but Mr. Mahr was able to convince the court to lower that to a level 8  
5 adjusted basis for Mr. Garcia, resulting in a greatly reduced sentence  
6 of just 30 months in case number CR-04-223-RHW."

7 As noted above, it was not Mr. Mahr who objected to the 16 point  
8 enhancement; instead, it was the Court who brought up the issue initially as to  
9 whether the 16-point enhancement was appropriate. It was not Mr. Mahr who  
10 convinced the Court that the 16-point enhancement was not appropriate; rather it  
11 was the Court who convinced Mr. Mahr of such a fact. His willingness to misstate  
12 the record heightens the Court's concern that Defendant received inadequate  
13 representation.

14 The Court also finds that there is a reasonable probability that, but for  
15 counsel's unprofessional errors, Defendant would not have pleaded guilty and  
16 would have insisted on presenting this defense. In his Motion to Dismiss the  
17 Indictment, Defendant argues that his underlying deportation proceeding violated  
18 his due process rights because he was deported as a result of his conviction for  
19 vehicular homicide, notwithstanding the fact that the Supreme Court held that the  
20 term "crime of violence" does not encompass offenses committed through the  
21 reckless, or grossly negligent, use of force, relying on *Leocal v. Ashcroft*, 543 U.S.  
22 1 (2004).

23 The Court finds that if Defendant's counsel would have discussed this  
24 possible defense with Defendant, it is likely that Defendant would have opted to  
25 present this defense rather than enter a guilty plea.

26 Accordingly, **IT IS HEREBY ORDERED:**

27 1. Defendant's Motion to Withdraw Guilty Plea (CR-04-223-RHW [Ct.  
28 Rec. 68]) is **GRANTED**.

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2, A hearing on Defendant's Motion to Dismiss Case (CR-04-223-RHW  
[Ct. Rec. 60]) is set for **February 22, 2007**, at **9:00 a.m.**

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and to provide copies to counsel.

**DATED** the 8<sup>th</sup> day of February, 2007.

*s/ Robert H. Whaley*

**ROBERT H. WHALEY**  
Chief United States District Judge

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